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SUBJECT: BRAZIL ENACTS FIRST WAVE OF SWEEPING JUDICIAL REFORMS

REF: 04 BRASILIA 1076

11. (SBU) SUMMARY. Brazil's justice system does not enjoy the confidence of society, being widely-perceived as slow, inefficient and accessible only to the wealthy and powerful. But the failures of the courts are increasingly viewed as an impediment to social and economic development. In December 2004, Constitutional Amendment 45 --supported by President Lula, congressional leaders, and top judges-- became law. It will streamline procedures in the Supreme Court and some lower courts, it strengthens human rights protections, introduces structural and professional reforms, and --most controversially-- it authorizes the creation of oversight bodies for judges and prosecutors. Perhaps the greatest impact will come from the introduction of the principle of judicial precedent for the first time in Brazil (a civil code country). A second bill to amend the Constitution and follow up on Amendment 45 is expected to pass in early 2005, and a third tranche of reform bills is not far behind. These three measures are detailed below. It is far too early to tell if the reforms will move the Brazilian judiciary towards efficiency, impartiality, and transparency, but judging by the political and public pressure, great attention will accompany them as they are put into practice. END SUMMARY.

TARNISHED REPUTATION

12. (SBU) A November 2003 survey by the Brazilian Bar Association found that the Brazilian judiciary is among the least trusted of the country's institutions: only 39% of respondents have confidence in the courts (by contrast, the press got 60% and Congress 34%). Some 74% of respondents said they fully or partly agree with the common saying, "There is no justice for the poor, the black, or the prostitute". One need only read the headlines to see why: high profile cases charging judges with corruption and influence peddling are common, and impunity seems widespread. At the end of 2004, some 115 senior judges throughout the country were under investigation. But the problem goes beyond corruption. For years, Brazilian judges have been notoriously resistant to reform, criticism, and oversight, leading one government official to dub them the "black-robed mafia". Judges are frequently in the press criticizing government policy, requesting raises, or avoiding jail.

JUDGE JOBIM'S REFORM AGENDA

13. (SBU) The public's perception is colored by the slowness of the legal system, caused less by incompetence than by suffocating bureaucracy and outdated procedures. A 2004 study ordered by Judge Nelson Jobim, Chief Justice of the Supreme Federal Court (STF), found that at the end of 2003 six million cases were in the federal courts alone (the volume in the state courts is five times greater), including 2.7 million in the 3rd Federal District that includes Sao Paulo state. The "congestion rate" in the federal courts was 84%, meaning that for every 100 cases that entered the courts in 2003, whether newly-presented or carried over from the previous year, only 16 reached a resolution. Judge Jobim took over as Brazil's highest judge in May 2004, replacing a bitterly anti-reform predecessor (ref A), and he has consulted closely with Congress and the administration as the various reform bills have been drafted and debated. Jobim has criticized Brazil's law schools for turning out "philosopher judges" incapable of managing their courts efficiently, and he points out that the judiciary's legendary slowness has created a parallel gray-market justice system where parties may agree to settle for a fraction of damages rather than spend years tied up in various courts to reach an unpredictable conclusion. For investors, foreign and domestic, the uncertainties created by this lack of transparency and predictability contribute greatly to the cost of doing business in Brazil. The economic effects of this system are insidious, contributing, for example, to notoriously high loan spreads that Brazilian banks charge in order to cover the risk that courts will not enforce collection efforts.

14. (U) A 2004 World Bank study using data from 2000 showed that (taking into account differences in purchasing power)

Brazil's judicial system is the world's second most expensive (trailing only Italy) at US\$33 per citizen per year, and that Brazilian judges are the second highest-paid in the world, trailing only the Canadians (U.S. judges are third). The study also shows that as a percentage of government spending, Brazil's judiciary is the world's costliest at 3.66% of the total public budget.

REFORMS -- TWELVE YEARS TO PASSAGE

15. (U) Soon after its passage in 1988, it became clear that Brazil's Constitution needed to be amended in order to modernize a lethargic and insular judiciary that had been left essentially unchanged for decades. In 1992, a bill to amend the Constitution was introduced in the Chamber of Deputies, where it wallowed in various committees before finally passing a floor vote in 2000 and going to the upper house. Its passage in the Senate was nearly as languid, and when it reached the floor in early 2003, President Lula da Silva, newly-elected and with his own reform ideas, sent it back to committee for changes. In early 2004, a logjam broke as the Chief Justices of the two highest courts (STF and STJ), both of whom were bitterly opposed to the reforms, were coincidentally replaced by pro-reform Chief Justices. On 8 December 2004, the Senate formally approved two bills: one with all the measures already approved in the Chamber that came into force immediately as Amendment 45 to the Constitution; and a second that includes new elements and must go back for a final Chamber vote in 2005.

CONSTITUTIONAL AMENDMENT 45

16. (U) Amendment 45 is now in force. It includes reforms of the overburdened Supreme Court and certain lower courts. It strengthens human rights protections and introduces structural and professional reforms, and --most controversially-- it authorizes the creation of oversight councils for judges and prosecutors. Among its measures:

SUPREME COURT REFORMS:

- Limited Binding Precedent ("sumula vinculante"). Brazil has never used a precedent system, so its courts decide the same legal issues over and over, making the administration of justice both inefficient and unpredictable. Chief Justice Jobim of the Supreme Federal Court (STF) once noted that this caused the high court to AVERAGE 85 decisions per day. Henceforth, STF decisions approved by at least eight of the 11 justices must be followed by lower courts. A study by the Getulio Vargas Foundation showed that in 2003, 17.3 million cases entered the judicial system (federal and state), meaning that each of Brazil's 13,000 judges averaged 1,300 cases that year. In the lower courts, some judges issue 300 decisions per month. These numbers could be significantly reduced as the precedent system take effect.

- Supreme Court Discretion. The STF must, by law, hear a wide range of cases, overwhelming its docket with procedural rulings. Under the reform, the STF is accorded greater discretion to refuse to hear certain cases that lack "general significance".

OTHER COURT REFORMS:

- Special Land Courts. Each court must create a special panel to hear land disputes.

- Labor Courts. The Superior Labor Court (TST) will gain ten new judges, for a total of 27. At the lower level, if a locality does not have a Labor Judge, then an ordinary judge will be allowed to hear labor cases.

- Circuit Riders. Establishes circuit judges to address the grave problem of localities that go years without a judge.

HUMAN RIGHTS REFORMS:

- Federalization. The Federal Prosecutor can step in and take over human rights cases from the states. This is designed to overcome the not infrequent conflicts created when human rights violators are important local-level figures.

- Treaties. International human rights accords will have the weight of "constitutional law". Amendment 45 also states that Brazil "submits itself to the International Criminal Court, whose creation it supported".

STRUCTURAL REFORMS:

- "Ombudsmen". Each court will establish an independent ombuds office to hear complaints.

- Procedural Rapidity. Blocks promotion of judges who fail to decide cases in a timely manner.

- Independent State Public Defenders. State public defenders

will have their own budgets and administrative autonomy. In the past they were dependent on the state judiciary for resources and oversight, creating conflicts of interest.

PROFESSIONAL REFORMS:

- "Professional Quarantine". Former judges and prosecutors are prohibited for three years from acting as lawyers in the courts where they previously worked.

- Career Reforms. Promotion decisions for judges and prosecutors will take into account their productivity. At least three years' prior legal experience will be required of new judges.

- "Collective Leave". Courts must begin working as soon as the official recesses are over, ending the practice of the entire court taking personal leave to extend the recess.

OVERSIGHT COUNCILS:

- Within six months, two national-level oversight councils will be established over judges and prosecutors. These so-called "external controls" were bitterly opposed by many of those affected and their professional associations. The new National Justice Council (CNJ) will hear complaints and apply sanctions against judges and court employees. It will have 15 members: 11 judges and prosecutors, two lawyers, and two members named by Congress. The similar National Prosecutors' Council (CNMP) will be a 14-member body with oversight over federal and state prosecutors.

SECOND BILL TO BE APPROVED BY CHAMBER IN 2005

17. (U) A second set of reforms --also enshrined in a bill to amend the constitution-- passed the Senate in December and now goes back to the Chamber for a final vote. It will follow up on Amendment 45 and is expected to become law in the first half of 2005. It includes:

- Blocking Appeals. A sort of reverse precedent mechanism to combat wasteful appeals and to complement the precedent authority given to the STF in Amendment 45. If lower courts issue rulings that coincide with prior decisions by the second and third highest courts --the Supreme Justice (STJ) and Superior Labor (TST) courts-- and if those higher court decisions are by two-thirds' majorities, then appeals are prohibited.

- Independent Federal Public Defenders. Comparable to the autonomy given to state defenders in Amendment 45.

- Arbitration. Brazil has few mechanisms for alternative dispute resolution (ADR). The bill will allow parties to submit cases to an arbiter for a speedier decision. It also creates new types of ADR including conciliation, mediation, and non-judicial arbitration.

- Privileged Forum. Currently, elected officials and cabinet members have the right to a "privileged forum", i.e., charges brought against them are heard by a high court rather than a common court. Congress, not surprisingly, wishes to extend this benefit to former, as well as current, elected officials.

- Nepotism. Prohibits judges from hiring close relatives to positions under their authority.

SUB-CONSTITUTIONAL REFORMS TO COME LATER

18. (SBU) President Lula is already thinking about next steps.

On December 15, even as they celebrated the passage of Amendment 45, the heads of the three branches of government discussed so-called "infra-constitutional" (or "sub-constitutional") reforms. This is a package of 23 bills --some new and some that have sat unmolested in Congress for years-- that the administration hopes to pass in the next year. It is designed to increase efficiencies through changes in civil, penal, and labor law procedures. It includes greater use of the principle of binding precedent, limitations on wasteful appeals, stricter adherence to court deadlines, and simplification of some family law procedures. Chief Justice Jobim is hopeful that the bills can be passed in early 2005, promising that "if that happens, by the end of the year some results will already begin to be felt".

COMMENT - A LOT OF EYES ARE WATCHING

19. (SBU) It is far too early to tell if these reforms will have the desired effect, but judging by the ambition reflected in their broad scope, by the solid support from President Lula, Congressional leaders, and key judges, and by the sense that Brazil's ossified judiciary has become a

serious impediment to social and economic growth, there is reason to be encouraged that the reforms are at least a good first step. But there remain resolutely anti-reformist pockets in the judiciary and others whose interests are threatened by a modern judicial system. President Lula told the press in December that, "Society demands rapid, accessible, and adequate justice. The broad constitutional reform that finally passed is a necessary condition for this to take place. But it won't work on its own. Now we need to put into practice the advances made in the reforms". Brazil's books are full of unenforced laws, but a combination of political pressure and support from the business community and the public suggest that many eyes are watching to see how these reforms are implemented --and to ensure that the judiciary becomes part of Brazil's solution rather than part of the problem.

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